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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

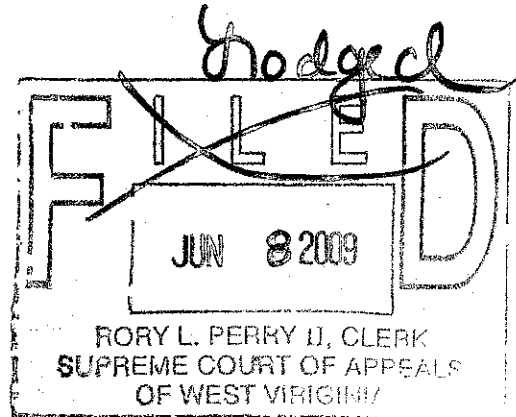
CHARLESTON TOWN CENTER COMPANY, LP,

Petitioner/Respondent Below,

v.

**STEVEN and CYNTHIA BUMPUS, on
behalf of STEVEN M. BUMPUS, a minor;
AUGUSTA ROBINSON, on behalf of
Kevin Streets, a minor; and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,**

Respondents/Complainants Below.



**WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION'S
BRIEF OF AMICUS CURIAE**

I. INTERESTS OF AMICUS

- WVELA is committed to the elimination and prevention of discrimination through the law and the enforcement of law.
- While WVELA members specialize in employment discrimination, public accommodation cases such as under consideration here make use of similar proof formula.
- WVELA believes that it is important that the Court in it's Human Rights Act decisions take account the realities of 21st. Century discrimination, in America, and maintain a commitment to tried and true proof formula.

II. FACTS

On the evening of Saturday, April 22, 2006 African American teenagers Steven Bumpus and Kevin Sheets were dropped off at the Charleston Town Center Mall. There they met up with another friend, who is also African American. As the three boys walked through the mall, they noticed that they were being watched and followed. (Final Decision, p. 8, Finding of Fact No. 4;

Transcript Vol. I, pp. 22-24, 28, 29, 105, 106, 231; Transcript Vol. II, p. 47). The Charleston Town Center Mall has denied that it paid any special attention to these boys, or that it took any account of race; however, the Town Center Mall Security force records reflect that at about 7:30 p.m. one of the guards "kept a group of BM [black males] moving" (Commission's Exhibit 22).

During the first hour that they were at the mall, the three boys went to the food court of the Mall, where they met some additional friends. The group of eight youth was sitting around different tables and some of them had been eating food from the food court vendors. After they had been there a few minutes, the boys were confronted by a Mall security guard, who ordered them to leave the food court. The guard told inconsistent stories about how he came upon the boys, and he admitted that he did not give them any opportunity to obtain food, or to regroup into smaller groups, before ejecting them from the food area. (Final Decision, p. 10; Commission's Proposed Findings of Fact and Conclusions of Law, p. 24).

The guard then solicited the help of two Charleston Police Officers to assist in evicting the Complainants from the food court. (Final Decision, pp. 9-10, Findings of Fact No's. 5, 6, 7 and 8; Transcript Vol. I, pp. 109 -110). The Complainants testified that they saw white youth at the food court who were not being evicted, and they perceived that they were being treated unfairly. (Transcript Vol. I, pp. 33, 155-157). One of the boys, who had purchased and eaten some food, was particularly annoyed. (Final Decision, pp. 9-10, Finding of Fact No. 6; Transcript Vol. I, pp. 31, 108-110).

Bumpus and Streets then left the food court, and, with two other friends, browsed through other parts of the Mall. (Final Decision, pp. 9 -11, Findings of Fact No's. 6 and 8; Transcript Vol.

I, pp. 34-36, 111 -112). At one point, the boys were confronted again by a security guard, on the second level, who prohibited them from window shopping and told them that they must "constantly keep moving." (Final Decision, pp. 10-11, Finding of Fact No. 8; Transcript Vol. I, pp. 36, 112).

Just before 9:00 p.m., as closing time approached, Mall security guards confronted the boys again, this time insisting that they leave the Town Center Mall. (Final Decision, p. 11, Finding of Fact No. 9; Transcript Vol. I, pp. 37, 81, 113). The boys were not being disruptive (Final Decision, p. 12 , Finding of Fact No. 12; Transcript Vol. I, pp. 141; Commission's Exhibit 17), and the stores in the Mall were not yet closed. (Final Decision, pp. 13-14, Finding of Fact No. 16; Commission's Proposed Findings of Fact and Conclusions of Law, pp. 8-9). Yet, the boys were escorted out of the Mall by officers who offered them no explanation as to why they were being evicted. The Complainants were compliant and left as they were directed. (Final Decision, p. 12, Finding of Fact No. 12; Transcript Vol. I, p. 141).

The Charleston Town Center Mall claimed that the Complainants were escorted out of the Mall after 9:00 p.m., when the stores in the Mall were already closed. CTCM also claimed that Lt. Hager talked with Steven Bumpus' mother, Cynthia Bumpus, on the phone during these events. The Complainants dispute these claims, and the cellular phone records and other independently established facts support the ALJ's rejection of the Charleston Town Center Mall's claims. (See Final Decision, pp. 12-14; see also Commission's Proposed Findings of Fact and Conclusions of Law, pp. 8-9).

The boys then went to a local cinema for a short while, and later returned to the Mall area, where they had a meal at Chili's Restaurant, which is part of the Mall structure but is accessed

from the outside through a separate entrance. (Final Decision, p. 15, Finding of Fact No. 22).

At approximately 10:55 p.m., after eating at Chili's, the four teens exited the restaurant. Just outside of Chili's, Steven Bumpus telephoned his mother to have her pick him up. One of the four boys left on his own, and the other three waited there on the sidewalk for Mrs. Bumpus to arrive. (Final Decision, p. 11, Finding of Fact No's. 23 and 24; Transcript Vol. I, pp. 40, 44, 117, 236; Commission's Exhibits 30 and 31).

Just prior to the time that the four teens emerged from Chili's, the Town Center Mall security personnel had called the Charleston Police Department regarding a large group (fifteen to twenty) of African American youth who were creating a disturbance at the Court Street end of the Town Center Mall. (Final Decision, pp. 16-17, Findings of Fact No's. 26, 27 and 28; Commission's Exhibit 34; Commission's Exhibit 17, p. 4; Transcript Vol. III, pp. 110-111). Bumpus and Sheets were not a part of this group.

Charleston Police Officers were dispatched, and arrived in several police cars and a prisoner transport wagon, just as Steven Bumpus was exiting Chili's and calling his mother for a ride. (Final Decision, p. 17, Finding of Fact No. 28; Commission's Exhibits 30, 31, and 34). Steven Bumpus and Kevin Sheets saw this group of youth, and witnessed the rude things being said, back and forth between the youth and the security guard.

The Mall security guard testified at the hearing that he did not know whether Bumpus or Streets "mouthed off" to him; but, they were "guilty by association we have them all leaving...". "We don't just say, 'well, you can stay, you have to go.'" Tr. Vol. III, pages 119 and 128, Commission's Exhibit No. 8, p. 5; Final Decision p.16, Finding of Fact No. 26.

There were six police officers summoned. (Commission's Exhibit 34). As the police

arrived, the group who had been causing the disturbance fled. (Final Decision, p. 18, Finding of Fact No. 32; Transcript Vol. I, pp. 118-119). But the Mall security officer in charge then turned his attention to Bumpus, Streets, and Martin, the only African American youth left on the scene, who were merely standing on the sidewalk by the street, waiting for Mrs. Bumpus. (Final Decision, pp. 16-17, 18, 21-23, Findings of Fact No's. 26, 33, 49 and 50).

As the police officers arrived, they were asked by Mall security to assist in the removal of Bumpus, Streets, and Martin. (Final Decision, p. 29). While the boys were waiting for a ride along the curb outside of Chili's, they were confronted by the Mall security personnel, and then by two Charleston Police Officers, and told to leave the sidewalk. When the boys explained that they were merely waiting for a ride, questioned why they had been singled out for this treatment, and ultimately refused to leave the sidewalk, the boys were arrested by the police for trespassing. (Final Decision, pp. 18-19, Findings of Fact No's. 33, 34, 36 and 42; Transcript Vol. I, pp. 11-12, 23-24).

Police Officer Midkiff testified that he had been told by Mall security that the Complainants had been "harassing customers" throughout the day (Transcript Vol. II, p. 12), which is undeniably a false accusation.¹ Police Officer Coleman testified that other than staying somewhere that Mall security did not want them to be (that is, on the sidewalk in front of Chili's) he did not see the Complainants violate any laws. (Final Decision, p. 21, Finding of Fact No. 46; Transcript Vol. II, pp. 115-119; see also Transcript Vol. II, pp. 23-24). Although the Complainants were taken away by the police that night, all charges against the Complainants

¹It is undisputed that the Complainants spent barely two hours inside the Mall that day, all of it after 7:00 p.m., and there apparently was never an allegation by the Mall, nor any evidence presented, that they ever harassed a customer.

were eventually dropped.

II. DISCUSSION OF LAW

Burden of proof regarding legitimate non-discriminatory motive is upon the entity denying access. Town Center argues at pages 16 through 18 of their Appellant's Brief that "the record in this matter demonstrated that any such denial [of access to a place of public accommodation] occurred solely due to the actions of the Complainants in violating the uniformly applied mall Code of Conduct." *Id.* at 16-17. Town Center relies upon Judge Wilson's determination that it had "articulated a legitimate non-discriminatory purpose for its actions" to argue that this finding shifted the burden to the Complainants "to show by a preponderance of the evidence that enforcement of the Code of Conduct was not the true reason for the Town Center's action." *Id.* at 17. However, this argument does not conform with the language of K-Mart Corporation v. Human Rights Com'n, 181 W. Va. 473, 383 S.E.2d 277, wherein the Court observed that "[o]nce the Complainant has established a prima facie case of discrimination, the burden shifts to the defending place of public accommodation to demonstrate a legitimate and non-discriminatory reason for their action sufficient to overcome the inference of discriminatory intent. [citation omitted]. If the Defendant is successful in rebutting the prima facie case of discrimination, the Complainant then has the opportunity to show that the reason given by the Defendant was merely a pretext for discriminatory motive. *Id.* at ____, 281.

- Even if the burden on the Respondent is only one of production, meeting this burden does not resolve the case.
- The inquiry only moves on to the 3rd. step, where the trier of fact must decide whether, in light of the evidence, the proffered reason is persuasive or whether it is more likely that discriminatory motives were the reason.
- TCM claimed by the complainants violated the rules and were disruptive.

- Here the ALJ noted that the offered reason was "plausible," as pointed out by the Appellant; but ultimately found that the offered reason was *not credible* in light of the evidence.
- The ALJ found that there were too many ways in which the evidence in the record did not support the explanations offered by TCM.

Contrary to the positions discussed by the Appellants in their memorandum, the K-Mart Court had no difficulty in finding that the Complainants who were shopping at the K-Mart in that case were attempting to avail themselves of public accommodations and, thus, were individuals protected by W. Va. Code § 5-11-9.

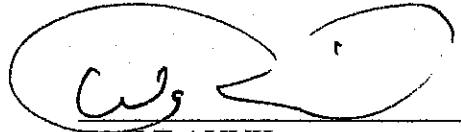
The question of whether there were facts in the record from which a reasonable conclusion could be made that the direction of this negative attention to the Complainants was caused in whole or in part by their race. Certainly there were facts in the record from which a reasonable conclusion could be made that this aggressive application of the Town Center rules to these Complainants was significantly influenced by their race.

It would be, as discussed above, inappropriate for this Court to substitute its judgment for the judgment of the Human Rights Commission where the Human Rights Commission had the opportunity to evaluate the credibility of witnesses and observe their demeanor and tone in testifying. In a situation where credibility and motive are critically important, the role of a finder of fact who has neither opportunity to observe witnesses is particularly important. Of course, credibility and motive are directly at issue in this case.

III. CONCLUSION

For the reasons set forth above, Amicus West Virginia Employment Lawyers Association urges the Court to sustain the judgment of the West Virginia Human Rights Commission.

Respectfully submitted:

A handwritten signature in dark ink, appearing to be 'Walt Auvil', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

WALT AUVIL
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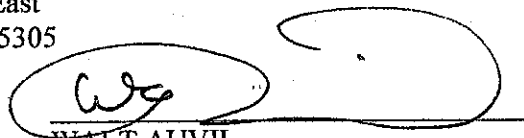
CERTIFICATE OF SERVICE

I, Walt Auvil, do hereby certify that the foregoing *West Virginia Employment Lawyers Association's Brief of Amicus Curiae* was served upon the following via facsimile and by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 1st day of June, 2009, addressed as follows:

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Counsel for Appellant Charleston
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A signed copy
sent June
8th, 2009

The Honorable Rory L. Perry II, Clerk
West Virginia Supreme Court of Appeals
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